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Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention

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Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention

Cover Page Footnote

International Law; Commercial Law; Law

Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a “New” New York Convention

Robert C. Bird†

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I. Introduction

In May 1958, Professor Pieter Sanders, a scholar from the Netherlands, sat down at a small portable typewriter in a leafy Connecticut garden at the home of his father-in-law.¹ Over a

† Associate Professor and Ackerman Scholar, University of Connecticut. My thanks to Yan Li for providing helpful research assistance.

¹ See Stavros Brekoulakis, *Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement*, 19 AM. REV. INT’L ARB. 415, 415 (2008); J. William Rowley, *Remarks on ‘Pieter Sanders at 95: Reflections on the New York Convention,’* 2 DISP. RESOL. INT’L 13, 16 (2008). Pieter Sanders remembers, “I can still see myself sitting in the garden with my small portable typewriter on my knees. It was there, sitting in the sun, that the [forerunner to the New York Convention] was conceived.” Pieter Sanders, *The Making of the Convention*, in UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 3, 3 (1999), available at <http://www.newyorkconvention.org/new-york-convention/history>.

weekend, he crafted a proposal that was presented to the United Nations Conference on International Commercial Arbitration, held the next Monday.² That modestly drafted document evolved into the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, now known as the New York Convention ("Convention").³ Professor Sanders could not have foreseen that his modestly drafted proposal would be signed by over 140 nations and would become one of the most successful conventions in the history of international law.⁴ Today, the Convention is considered to be a veritable constitutional charter for international arbitration and is the most important international legal instrument in its field.⁵

Arbitration is a private system of adjudicating disputes through a neutral professional known as an arbitrator.⁶ The seemingly simple concept resolves disagreements in a fashion that is superior in many ways to commercial litigation. Arbitration is faster and cheaper.⁷ The process is flexible to meet parties' needs, is confidentially administered by experts in the field, and delivers resolutions to disputes that are both complete and final.⁸

² See Brekoulakis, *supra* note 1, at 415.

³ See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

⁴ See Brekoulakis, *supra* note 1, at 415-16. Pieter Sanders is now known as the father of international commercial arbitration. For a charming interview of Professor Sanders, now living well into his ninth decade, see *Reflections on the New York Convention Video*, INT'L COUNCIL FOR COMMERCIAL ARBITRATION, http://www.arbitration-icca.org/officers-and-members/honorary-presidents/Pieter_Sanders.html (last visited Apr. 4, 2012).

⁵ See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 92-93 (2009).

⁶ See BLACK'S LAW DICTIONARY 42 (3d pocket ed. 2006).

⁷ See Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 1899 PLI/CORP 257, 259-60 (2011).

⁸ See *id.*; see also Rebecca Fett, *Forum Selection for Resolution of Foreign Investment Disputes in China*, 62 DISP. RESOL. J. 73, 77 (2007) ("[S]ince arbitration allows the parties to select an arbitrator with specific expertise relevant to the dispute, an arbitrator is still more likely to have a better understanding of the dispute than a judge."); W. Michael Reisman & Heide Iravani, *Conflict and Cooperation: The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 36 (2010) ("A critical strut of the architecture of international commercial arbitration is the guarantee of the finality of arbitral awards once they are issued . . ."); R. Michael Rogers & John P. Palmer, *A Speaking Analysis of ADR Legislation for the*

That is what international arbitration should typically accomplish. Yet, situations do exist where a second forum can interfere with resolution of the arbitration in the primary jurisdiction, thus disabling the smooth functioning of the arbitral process. One such situation is the enforcement of annulled arbitration awards, which is a focus of this article. Enforcement of annulled arbitration awards typically occurs when an arbitrator issues an award, the court annuls the award for a certain reason, and then a court in another jurisdiction decides to enforce the previously-annulled award.⁹ Such a practice has been viewed with consternation by international firms which anticipate the arbitral forum to be the final locale of resolution of any commercial disputes.¹⁰

The enforcement of annulled arbitration awards appears to be a narrow, almost picayune, topic hardly worth more than a passing reference in the arbitration literature. Despite the seemingly limited potential for such a topic to raise ire, the disagreement between writers on this issue has, at times, been sharp and passionate. A single court decision on the topic, for example, can attract lavish praise from one author and withering critique from another.¹¹ Whether through judicial disagreement or scholarly flourish, enforcement of annulled arbitral awards has been, and remains, an aggressively debated issue.¹²

Divorce Neutral, 31 ST. MARY'S L.J. 871, 900 (2000) ("If an arbitrator has expertise and an abiding interest in the subject, he may be a better decisionmaker than the local judicial alternative."). But see Gary Minda, *Arbitration in the Post-Cold-War Era: Justice Kennedy's View of Postexpiration Arbitrability in Litton Financial Printing Division v. NLRB*, 22 STETSON L. REV. 83, 90 n.24 (1992) ("Issues of contractual intent have always been the grist of judges because judges, not arbitrators, have presumably superior expertise in determining legally enforceable obligations under contract.").

⁹ See Reisman & Iravani, *supra* note 8, at 7-10.

¹⁰ See *id.* at 16.

¹¹ See *infra* text accompanying notes 151-57 (noting this sharp division).

¹² The issue may arguably have been receiving too much attention, a veritable scholarly red herring. See Roger P. Alford, *The American Influence on International Arbitration*, 10 OHIO ST. J. ON DISP. RESOL. 69, 69 (2003) ("Why embark on treacherous waters to face the fractures within [the arbitration community] when we could remain anchored in the safe harbor of yet another discussion of Chromalloy and Hilmarton?"). "Chromalloy" and "Hilmarton" are common parlance for two leading cases that address the topic of the enforcement of annulled awards and will be discussed in more depth later in this article. See *infra* text accompanying notes 106, 162.

In U.S. law reviews, debate over the propriety of enforcing vacated international arbitration awards has centered on a quartet of federal court cases that have directly addressed this issue. *Chromalloy Aeroservices v. Arab Republic of Egypt*,¹³ decided first, enforced an annulled award.¹⁴ *Chromalloy*'s main judicial rival is *TermoRio S.A. E.S.P. v. Electranta S.P.*,¹⁵ which declined to enforce an annulled award.¹⁶ The remaining pair, *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*¹⁷ and *Spier v. Calzaturificio Tecnica S.p.A.*,¹⁸ also declined to enforce an annulled award when requested to do so.¹⁹ Furthermore, a number of foreign jurisdictions exist where post-annulment enforcement has either occurred in the past, is wholly embraced today, or has the potential to happen in the future due to the structure of existing national law.²⁰

The purpose of this article is to examine the current treatment of enforcement of annulled arbitration awards with the goal of not simply adding to the debate by siding with one court over another but seeking a stable and uniform solution that would be widely acceptable across national jurisdictions. Part II examines the benefits of international commercial arbitration to businesses and briefly describes the history and development of the Convention. Part III explores the judicial divide surrounding enforcement of annulled awards. This Part shows how an ambiguously written

¹³ 939 F. Supp. 907 (D.D.C. 1996).

¹⁴ See *id.* at 908, 914-15.

¹⁵ 487 F.3d 928 (D.C. Cir. 2007).

¹⁶ Though to be precise, *TermoRio* did not explicitly condemn *Chromalloy*, but rather interpreted its holding so as to, in effect, narrow any future precedential impact that *Chromalloy* might have. See Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 31 n.26 (2009) ("The Court of Appeals for the District of Columbia in *TermoRio* did not overrule *Chromalloy*, but distinguished it on various grounds, including the fact that all the connections in *TermoRio* were with Colombia (Colombian parties, Colombian seat, and Colombian law), and that there was no finality clause precluding judicial review as there was in *Chromalloy*.").

¹⁷ 191 F.3d 194 (2d Cir. 1999).

¹⁸ 77 F. Supp. 2d 405 (S.D.N.Y. 1999).

¹⁹ See *id.* at 408; *Baker Marine*, 191 F.3d at 198.

²⁰ See Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1390-93 (2007).

Convention provision has enabled courts to take different perspectives on the appropriate scope of enforcement of annulled arbitration awards. Part IV evaluates one of the pending solutions to the ambiguous language problem, a revision of the Convention proposed by leading arbitration expert Albert Jan van den Berg. While the proposed revision has attracted criticism, this Part offers a defense of the proposed regime. This Part shows that the proposed revision offers the current best hope for resolving current structural limitations in the now-aging Convention, and it is especially relevant in resolving the continuing conflict over the enforcement of annulled awards.

II. International Commercial Arbitration and the Convention

A. *The Benefits of International Commercial Arbitration*

The value of domestic arbitration to commercial enterprises is well understood in the literature. Scholars rightly hail arbitration as a cheaper, quicker, and more flexible alternative to courtroom litigation.²¹ Courts generally agree.²² A variety of debates exist over the appropriate scope of domestic arbitration, the appropriateness of consumer participation in arbitration being one example.²³ However, scholarly consensus regarding the benefits

²¹ See, e.g., Joseph L. Daly & Suzanne M. Scheller, *Strengthening Arbitration by Facing its Challenges*, 28 QUINNIPAC L. REV. 67, 67 (2009) ("The purpose of arbitration is to provide quick, efficient, and inexpensive resolution of disputes."). Arbitration is of course not without criticism. E.g., Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 5 ("Despite repeated evidence that business lawyers tend to view arbitration more favorably than litigation in key categories (fairness, speed to resolution, and cost), the literature frequently focuses on various perceived shortcomings, including unqualified arbitrators, uneven administration, difficulties with arbitrator compromise, and limited appeal. There are, moreover, frequent complaints regarding delay and high cost.").

²² See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (describing arbitration as simple, informal, and expeditious relative to courtroom litigation); *Gray HoldCo Inc. v. Cassidy*, 654 F.3d 444, 459 (3d Cir. 2011) ("[A]rbitration is meant to streamline the proceedings, lower costs, and conserve private and judicial resources"); *Prod. & Maint. Employees' Local 504, Laborers' Intern. Union of N. Am., AFL-CIO v. Roadmaster Corp.*, 916 F.2d 1161, 1163 (7th Cir. 1990) ("Arbitration clauses are agreements to move cases out of court, to simplify dispute resolution, making it quick and cheap.").

²³ E.g., R. Wilson Freyermuth, *Foreclosure by Arbitration*, 37 PEPP. L. REV. 459

of business-to-business arbitration, including primacy of price, time, and flexibility, remains largely intact.²⁴

This consensus, certainly appropriate in domestic arbitration, is not characteristic of the international commercial setting. International arbitration is costly; it is so expensive that, in some cases, it can be more costly than a trial.²⁵ Arbitration experts must be paid, and their time is not cheaply given.²⁶ Any supervisory institution that either provides the arbitrator or sets the rules must also be paid.²⁷ By contrast, court fees lack these payments.²⁸ In addition, travel to the site of arbitration, which includes the use of hotel and rented rooms, is also an expense for at least one, or perhaps both, parties.²⁹ Finally, certain arbitration proceedings, such as *ad hoc* proceedings arranged outside the supervision of an institutional framework, have been reported to be “frighteningly expensive.”³⁰ Complex cases can increase arbitration costs. Lengthy written submissions, extensive expert evidence, and long

(2010); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010).

²⁴ E.g., DOUGLAS SHONTZ ET AL., RAND INST. FOR CIVIL JUSTICE, BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL ix (2011) (reporting that a majority of corporate counsel surveyed reporting belief that “contractual arbitration is better, faster, and cheaper than litigation.”); NAT’L ARBITRATION FORUM, BUSINESS-TO-BUSINESS MEDIATION/ARBITRATION VS. LITIGATION 2 (2005), *available at* <http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf> (citing 1997 study of 1,000 of the largest U.S. corporations which found that ninety percent of respondents viewed alternative dispute resolution as a “critical cost-control technique” and seventy-nine percent used arbitration in the last three years).

²⁵ See Jay Lawrence Westbrook, *International Arbitration and Multinational Insolvency*, 29 PENN ST. INT’L L. REV. 635, 641 (2011). One analysis of the costs of international commercial arbitration reveals that eighty-two percent of costs are spent on legal advisers and parties presenting their cases while only sixteen percent covers arbitrator costs and two percent goes to the administration of the arbitration procedure. See NADJA MARIE ALEXANDER, *INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES* 41 (2009).

²⁶ See BORN, *supra* note 5, at 1646-51 (providing a detailed discussion of an arbitrator’s right to payment); Michael Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164, 164-65.

²⁷ See BORN, *supra* note 5, at 85.

²⁸ See Kerr, *supra* note 26, at 164-65.

²⁹ See BORN, *supra* note 5, at 85.

³⁰ Richard J. Graving, *The International Commercial Arbitration Institutions: How Good A Job Are They Doing?*, 4 AM. U. INT’L L. REV. 319, 368 (1989).

hearings all give arbitration a quasi-courtroom character, without the state shouldering the costs of the proceedings.³¹ This does not mean that all arbitration proceedings cost more than courtroom battles but that under certain conditions, the costs and benefits of arbitration can be neutralized.

International arbitration is also time-consuming. The process can drag on for years.³² A once highly malleable instrument, international arbitration has been imbued with formalized rules in an effort to harmonize the practice of arbitration across national institutions.³³ This has led one U.K. Lord Justice of Appeal to lament that inflexible arbitration could devolve into “all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge’s power to bang together the heads of recalcitrant parties[.]”³⁴

Arbitration rules, while creating a sense of orderly process, can significantly erode the ability of arbitration to reach a prompt resolution. Overall, commercial disputes can take as long as three years to reach a final reward.³⁵ While a three-year resolution seems rapid when compared to the glacial pace of some jurisdictions,³⁶ it might not present a dramatic advantage in those with more efficient national courts.³⁷ One author succinctly summarizes the supposed cost and time savings in international arbitration, concluding that “[o]n balance, international arbitration does not necessarily have either dramatic speed or cost advantages or disadvantages as compared to national court proceedings. . . . This conclusion is supported by empirical evidence and anecdotal accounts of users’ evaluations of the international arbitral process

³¹ See BORN, *supra* note 5, at 85.

³² See Westbrook, *supra* note 25, at 641.

³³ See Stipanowich, *supra* note 21, at 23.

³⁴ Michael John Mustill, *Arbitration: History and Background*, 6 J. INT’L ARB. 43, 56 (1989).

³⁵ See BORN, *supra* note 5, at 86.

³⁶ The speed of Indian courts is one well-known example. *E.g.*, Thomas M. Britt III et al., *BRICs Due Diligence: What you Need to Know*, 1897 PLI/CORP 35, 52-53 (2011) (stating that an average Indian lawsuit takes fifteen years to resolve); *see also* John Armour & Priya Lele, *Law, Finance, and Politics: The Case of India*, 43 LAW & SOC’Y REV. 491, 510 (2009) (reporting ten year delay as typical).

³⁷ See BORN, *supra* note 5, at 84-86.

and its advantages.”³⁸

If arbitration does not consistently deliver time or cost advantages, then why do international parties participate in arbitration so readily? For global firms, arbitration is not simply an efficiency tool, but a way to manage legal risk.³⁹ Legal risk management is the process of gathering knowledge about legal risks, assessing the costs of such risks, and making efficient decisions within an ambiguous legal environment.⁴⁰ Firms know that contractual disputes are an inevitable part of doing business, and arbitration is one way of managing that risk.

While domestic companies face dispute resolution risk, for global firms, the exposure to that risk is amplified because of the potential influence of multiple jurisdictions. For example, in domestic arbitration, the judicial interaction with arbitration proceedings can vary across U.S. states and circuits.⁴¹ Such variance, however, is relatively small when compared to the great differences between arbitration laws and climates across national borders.⁴² In some countries judicial bias is a problem; in others, it is not.⁴³ In some countries, courts are willing, almost eager, to intervene in international arbitration proceedings and enforcement, but in others, courts are not.⁴⁴ The legal policy of national courts

³⁸ *Id.* at 86.

³⁹ See John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343, 404 (2011) (noting that arbitration treaties enable firms to mitigate legal risk, forum risk, and enforcement risk).

⁴⁰ See *Risk Management Law & Legal Definition*, US LEGAL, <http://definitions.uslegal.com/r/risk-management/> (last visited Apr. 4, 2012).

⁴¹ See Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 KAN. L. REV. 583, 625-26 (2004) (noting that judicial approaches to arbitration enforcement vary across states due to differences in state contract laws).

⁴² See, e.g., Stromberg, *supra* note 20, at 1371 (“The legal principles for vacating international arbitration awards are expressed in the national laws of the territory where the award is made. As national arbitration laws set forth varying grounds on which arbitration awards can be annulled, attorneys need to be familiar with different approaches across the globe.”). The Convention permits vacatur of awards, for example, under local law. See New York Convention, *supra* note 3, art. V(1)(e) (permitting court vacatur of awards in the nation “under the law of which [the] award was made”).

⁴³ See Stromberg, *supra* note 20, at 1392.

⁴⁴ One example of such engagement is the conduct of French courts, as exemplified in the *Hilmarton* decision, discussed *infra* text accompanying notes 161-78, 201. Rafael Villar Gagliardi and César Rossi Machado have written a positive review of one court

and the site of arbitration can have a significant impact on the costs, and even the outcome, of the proceeding.

This wide legal variance means that international commercial firms perceive arbitration differently. For example, some domestic scholars lament that arbitration is becoming increasingly formalized with greater use of judicial-style rules and discovery methods that resemble courtroom litigation.⁴⁵ The problem with such formalization is that it dilutes the very cost and time benefits that arbitration proceedings were designed to deliver.⁴⁶

From the international commercial perspective, however, the formalization of the arbitration process may be seen as an advantage of arbitration rather than a weakness. Formalization serves to mitigate the legal risk that firms face litigating in foreign tribunals.⁴⁷ Arbitration avoids the idiosyncratic and unexpected local traditions that contravene accepted and predictable practices in international dispute settlements.⁴⁸ Avoiding such variance—

system in the advanced developing world. See Rafael Villar Gagliardi & César Rossi Machado, *Highlights of Arbitration Developments in Brazil*, 16 IBA ARB. NEWS 112, 114 (2011) (“[T]he judiciary has shown tremendous respect for the central and important concept of arbitration as a private contractual matter. Much is still to be done, but the progress achieved is noteworthy and is a development about which the Brazilian arbitration community can be proud, and in which the international arbitration community can trust.”).

⁴⁵ See Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 889 (2011).

⁴⁶ See *id.* (“[A]rbitration itself is increasingly becoming more costly and protracted as it mimics court adjudication.”); Kenneth M. Kramer, *JAMS’ Expedited Rules: Returning Arbitration to Its Roots*, 28 ALT. TO HIGH COST LITIG. 191, 191 (2010) (“Now . . . there appears to be a growing consensus that the benefits of arbitration have been squandered and that the arbitration of today does not provide the benefits of speed, efficiency and cost control.”). The source of this effect has been attributed to both lawyers and litigants. See Robert F. Copple, 48 ARIZ. ATT’Y 44, 45-56 (2011) (“[B]ecause of litigant demands (or assumptions) of the same formal procedures that have slowed and encumbered litigation in the courts . . . arbitration has become increasingly judicialized and, as a result, less efficient and more costly. . . . [I]n many circumstances, arbitration has become a mirror image of a full blown judicial trial.”); William C. Smith, *Much to Do About ADR*, 86 A.B.A. J. 62, 63 (2000) (“[L]awyers have put their indelible mark on ADR. Arbitration, mediation and other ADR mechanisms now entail more rules, more delay, and more expense—precisely the headaches that ADR was designed to avoid.”).

⁴⁷ See Darlene S. Wood, *International Arbitration and Punitive Damages: Delocalization and Mandatory Rules*, 71 DEF. COUNS. J. 402, 406 (2004).

⁴⁸ See *id.* (“*Lex mercatoria* and international commercial arbitration form a match

and the confounding associated risk—is an important reason global firms avoid courts and choose arbitration and its forum-selecting qualities as its international dispute resolution process.⁴⁹

Thus, international litigants may avoid a courtroom not because of a court's complex, costly, and formal rules but rather in spite of such rules. A strength of international arbitration is that it is, indeed, formal, and it will produce a similar result as litigation without unfair judicial interference.⁵⁰ International arbitration can be perceived as a risk-mitigating substitute, rather than simply as an alternative to national court litigation.⁵¹

In addition, international commercial arbitration has inherent characteristics that potentially make it preferable to court resolution. These characteristics are important not because academics affirm them as such but because firms who participate in arbitration cite them as beneficial.⁵² First, one of the most important benefits of arbitration is to provide a neutral forum for resolving disputes.⁵³ A neutral forum is one that is free from the influence of either party.⁵⁴ In other words, no company involved in the dispute can use the site of the dispute resolution process to exert undue advantage over the other.

Neutrality begins with the arbitrator himself or herself. An arbitrator is, at least in theory, detached from national jurisdictions and obligations.⁵⁵ Often provided by an established supervisory organization, the arbitrator is widely expected to apply his or her expertise objectively.⁵⁶ Beyond the proceedings, undue advantage

made in heaven, in that parties seek to use both of these tools for the same reasons: to escape local traditions and biases encountered in national courts.”).

⁴⁹ See Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 95 (2000) [hereinafter Drahozal, *Commercial Norms*] (citing William W. Park, *Arbitration Avoids 'Hometown Justice' Overseas*, NAT'L L.J., May 4, 1998, at C18).

⁵⁰ See Yves Dezaley & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW & SOC. INQUIRY 285, 299 (1996).

⁵¹ See Drahozal, *Commercial Norms*, *supra* note 49, at 95.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ Arbitrators, however, are loosely regulated compared to their judicial

can arise from one firm's knowledge of the idiosyncrasies of a particular forum and the associated conveniences of nearby clients and counsel.⁵⁷ Local courts in one party's principal place of business may also convey an advantage to the local party through favorable juries and rules.⁵⁸ National courts can also impose a kind of "hometown justice," whereby judges apply their biases in favor of local firms at the expense of foreign litigants.⁵⁹ They may also convey the implication that an award against a local firm can result in lost jobs and stunted economic growth for the local population. Courts may be so infected with bias that firms might even use international arbitration to escape their own judiciary.⁶⁰ As one diarist scribed in 1831, "[there] is little use in going to law

counterparts. See Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53 (2005); Olga K. Byrne, Note, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1835 (2003).

⁵⁷ See, e.g., Gary B. Born, *Keynote Address: Arbitration and the Freedom to Associate*, 38 GA. J. INT'L & COMP. L. 7, 14 (2009) ("When . . . parties conclude a commercial contract, neither is particularly receptive to the prospective of litigation in its counter-party's home courts. These concerns are often rooted in sound concerns about the neutrality of local courts in international disputes."); Ya-Wei Li, *Dispute Resolution Clauses In International Contracts: An Empirical Study*, 39 CORNELL INT'L L.J. 789, 790 (2006) ("[U]nderstanding the language of foreign courts and navigating their complex procedural laws are anathema to many American businesses and their lawyers.").

⁵⁸ SAM LUTTRELL, *BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A 'REAL DANGER' TEST 3* (2009) ("From the international businessperson's perspective, the most significant risk is that judges in other states may be biased against foreign parties.").

⁵⁹ Drahozal, *Commercial Norms*, *supra* note 49, at 95 ("The principal reason parties choose to arbitrate international commercial disputes is . . . the desire to avoid 'hometown justice'. . . ."); see also MARIEL DIMSEY, *THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES: CHALLENGES AND SOLUTIONS* 224 (2008) ("[O]ne of the original reasons for distancing investment dispute resolution from national courts was the inevitable and unavoidable perception of bias that would arise if states were subjected to the courts of their own system."); GEORGIOS I. ZEKOS, *INTERNATIONAL COMMERCIAL AND MARINE ARBITRATION* 36 (2008) ("[T]he main reason parties choose to arbitrate international commercial disputes is because neither party is comfortable litigating in the public courts of the other's home country.").

⁶⁰ Symposium, *The Florida-Mexico Tomato Conflict: What Has Happened and Where Might It Go From Here?*, 11 FLA. J. INT'L L. 233, 284 (1997) (quoting Professor Michael Gordon, "when you ask Mexicans what is the most important reason for arbitration, it is not speed or cost, but to keep things out of the Mexican judicial system.").

with the devil when the court is held in hell.”⁶¹

Surveys bear out this business preference. For example, according to one survey, seventy percent of respondents reported that the neutrality of the forum was “highly relevant” in deciding whether to choose arbitration to resolve global disputes.⁶² In another, neutrality and impartiality were important reasons for parties to select a particular place to resolve arbitral disputes.⁶³ Thus, global firms are not simply looking for a cheaper or simpler forum but a neutral one that is free from unwarranted judicial interference, a characteristic that domestic litigants may take for granted.

Other characteristics of arbitration are also relevant to organizations. Arbitration awards are more readily enforceable than litigation awards.⁶⁴ Arbitration also provides a single, centralized forum to resolve disputes that circumvent jurisdictional and choice of law issues that plague international litigation.⁶⁵ Another advantage is the rapid enforceability of arbitration awards. A corporate survey reports that most corporations can enforce an arbitral award within one year’s time, potentially much quicker than collecting on a court judgment.⁶⁶ Further, party flexibility and autonomy are also factors, enabling firms to decide how, where, and by whom disputes will be resolved.⁶⁷ This helps

⁶¹ HUMPHREY O’SULLIVAN, *THE DIARY OF HUMPHREY O’SULLIVAN* 100 (1827-35) (Tomas de Bhaldraithe trans., Mercer Press. 1979).

⁶² Drahozal, *Commercial Norms*, *supra* note 49, at 95 n.83 (citing CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* app. 1, 395 (1996)).

⁶³ See WHITE & CASE, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 18, *available at* http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

⁶⁴ Drahozal, *Commercial Norms*, *supra* note 49, at 95.

⁶⁵ BORN, *supra* note 5, at 74.

⁶⁶ PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 3 (2008), *available at* http://www.pwc.co.uk/en_uk/uk/assets/pdf/pwe-international-arbitration-2008.pdf.

⁶⁷ Edward Ti Seng Wei, *Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement Under the New York Convention*, 2009 SING. J. LEGAL STUD. 592, 593 (2009); *see also* Leon E. Trakman, *The Twenty-First Century Law Merchant*, 48 AM. BUS. L.J. 775, 822 (2011) (“[T]wenty-first-century merchants exercise an ever-widening sphere of individual autonomy in choosing the form, substance, and process of transnational arbitration to regulate their disputes.”).

insulate the proceedings from external political and social considerations.⁶⁸ Parties also benefit from the confidentiality that arbitrations typically provide, something that judicial proceedings rarely offer to litigants.⁶⁹ Finally, arbitration may encourage settlement, as the dispute resolution environment is inherently more amicable than litigation and provides a more open forum to discuss settlements during the process. As one author rightly summarizes, “[I]nternational arbitration is much like democracy; it is nowhere close to ideal, and often fails to fully realize its objectives, but it is generally a good deal better than the available alternatives.”⁷⁰

B. The Convention: A Brief History

Although Professor Sanders’ weekend craftsmanship was certainly a critical innovation,⁷¹ other groups, including businesses, played an important role in the Convention’s development. The first draft of what became the Convention was actually drafted by the International Chamber of Commerce (“ICC”), a trade organization founded in 1919 that represented firms’ interest in the global economy.⁷² The ICC noted the weaknesses of the regime then in place, the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 (“Geneva Convention”).⁷³ While the Geneva Convention was a considerable

⁶⁸ Wei, *supra* note 67, at 593-94.

⁶⁹ For a discussion on the need for greater openness, see Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006).

⁷⁰ BORN, *supra* note 5, at 90.

⁷¹ See *supra* text accompanying notes 1-5. Professor Sanders demurred at such praise. When a professor called his draft a “a very bold innovation,” Professor Sanders responded simply regarding his effort as a mere “logical follow-up to the Geneva Convention of 1927, taking into account the experience gained since then in the increased use of arbitration.” Pieter Sanders, *The History of the New York Convention*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 11, 12 (Albert van den Berg, ed. 1999).

⁷² Richard A. Hulbert, *The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act*, 22 AM. REV. INT’L ARB. 45, 52 (2011) (citing Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of March 13, 1953, *reprinted in* 9(1) ICC INT’L CT. ARB. BULL. 32, 35 (May 1998)). See also *What is ICC?*, INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/id93/index.html> (last visited Apr. 4, 2012).

⁷³ BORN, *supra* note 5, at 93.

improvement over prior works, it had the limitation of only enforcing awards that strictly followed the rules of procedure where the arbitration took place.⁷⁴ Change was needed to solidify the conception and recognition of fully international arbitration awards.⁷⁵ The ICC proposed a largely “de-nationalized” form of arbitration, with processes and awards largely detached from national laws.⁷⁶ The United Nations’ Economic and Social Council (“ECOSOC”), also tasked with producing a draft convention, produced their own delocalized version of a convention.⁷⁷ The ECOSOC draft was considered to be quite conservative in its approach—in some ways more conservative than the Geneva Convention.⁷⁸ The ECOSOC attracted delegates to meet and discuss revisions but left the attendees faced with two distinct visions of how the new convention would be drafted.⁷⁹

The resulting conference, known as the United Nations Conference on Commercial Arbitration, was attended by forty-five nations and produced a compromise between the ICC and ECOSOC versions. Even without knowing the bright future that lay ahead of it, the resulting Convention was a major improvement over its Geneva predecessor. Of its improvements, the most important was the elimination of the cumbersome “double exequatur” requirement, which required that an award could only be recognized abroad if the courts at the site of the arbitration confirmed it.⁸⁰ This extra step slowed the winning party’s ability to enforce the award and left that party vulnerable to the bias of the domestic courts at the site of the arbitration.⁸¹ In addition, the Convention expanded its coverage from just the recognition and enforcement of arbitral awards to the enforcement of international

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 93-94.

⁷⁸ HAMID G. GHARAVI, *THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD* 50 (2002).

⁷⁹ BORN, *supra* note 5, at 94.

⁸⁰ Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT’L L.J. 43, 55 (2002).

⁸¹ *Id.*

arbitration agreements.⁸² These adoptions were added in a “race against time” late in the conference, as attendees realized that focusing on awards was insufficient.⁸³ The final document, in significant part due to the efforts of business interests, proved to be a great success.⁸⁴

Unfortunately, even the most successful legal innovations cannot avoid conflict indefinitely. As with virtually any widely relied upon statements or principles, disagreement over some language of the Convention has developed into controversy.⁸⁵ Whether the rush to finalize the draft impacted its language will be left to history, but what is clear is that the language of the Convention has been unable to contain the varying perspectives of national courts.⁸⁶ These disagreements planted the seeds of a conflict that has divided intra-national and infra-national courts as well as generated voluminous discussion in academic scholarship.⁸⁷ The conflict over the appropriate scope of the enforcement of annulled awards, which arose out of this interpretive ambiguity, is the subject of the next section.

III. The Legal Debate Surrounding the Enforcement of Annulled Arbitration Awards

A. *The Source of the Debate under the Convention*

Arbitration is by its nature consensual. Parties must use arbitration only if they have agreed to do so.⁸⁸ Arbitration not only requires an agreement to arbitrate, but also establishes the scope of

⁸² BORN, *supra* note 5, at 94.

⁸³ *Id.* at 94 n.550.

⁸⁴ See Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 Hous. J. Int'l L. 1, 37-38 (2010).

⁸⁵ See, e.g., Amber A. Ward, Comment, *Circumventing the Supremacy Clause?: Understanding the Constitutional Implications of the United States' Treatment of Treaty Obligations Through an Analysis of the New York Convention*, 7 SAN DIEGO INT'L L.J. 491, 498-99 (2006) (“Article V allows the rendering country to annul an arbitral award. Article VII allows the enforcing country to override an Article V annulment, which will generally be based on the local law of the rendering country, and uphold an arbitral award on the basis of the more favorable domestic law of the enforcing country.”).

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ BORN, *supra* note 5, at 173.

covered disputes; rules and use of an institution; and the language, seat, and choice of law of the arbitration.⁸⁹ After the arbitrator or arbitration tribunal reaches a decision, the non-prevailing party is expected to pay the awarded amount.⁹⁰ Responses from users of commercial arbitration reveal that most parties see the writing on the arbitral wall and end the conflict here. One survey reports that in over three-quarters of respondents' arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award.⁹¹ Parties will also regularly settle after an award in order to obtain prompt payment by avoiding recognition and enforcement proceedings in a foreign jurisdiction.⁹² With four out of five disputes resolved without court intervention, participating firms reveal a solid satisfaction with the arbitral process.⁹³

Problems begin when the judiciary intervenes in the recognition and enforcement of arbitral awards. Such intervention can begin when a losing party feels strongly that an award is unjust; it can seek to set aside or annul the award granted by the arbitrator.⁹⁴ Grounds for annulment are typically sought in the domestic forum where the arbitration occurred.⁹⁵ Most national courts will grant annulment due to lack of an arbitration agreement, improper scope, improper subject matter, insufficient opportunity to present, or because the award is contrary to public policy.⁹⁶

In especially protracted cases, the annulment of an arbitration award by the court does not necessarily end the dispute. The party whose award was annulled can seek to get the award enforced in an entirely different court system.⁹⁷ This secondary enforcement action raises some difficult questions regarding the proper role of a judiciary over an arbitral award in another jurisdiction.

⁸⁹ *Id.*

⁹⁰ *See id.* at 174.

⁹¹ PRICEWATERHOUSECOOPERS, *supra* note 66, at 2.

⁹² *Id.* at 3.

⁹³ *Id.* at 5, 6 (reporting that "86% of respondents were satisfied with international arbitration" and that "81% of disputes [were] resolved without the intervention of a national court").

⁹⁴ BORN, *supra* note 5, at 2552.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2552-53.

⁹⁷ *See id.* at 2675-88.

Through no fault of the original drafters, who likely could not have anticipated such a circumstance taking on a life of its own, the Convention provides insufficient guidance on resolving this difficult issue. Two articles of the Convention are relevant to this issue: the set aside grounds of Article V⁹⁸ and the local empowerment language of Article VII.⁹⁹

Article V of the Convention states that “[r]ecognition and enforcement of the award *may* be refused” if, among other reasons, the award has been “set aside by a competent authority of the country” in which the award was made.¹⁰⁰ The obvious interpretation of this language enables courts to decline enforcement of annulled awards. However, the permissive “may” in Article V does not compel courts to refuse enforcement. In the spirit of its brevity, the Convention does not provide any more detail.¹⁰¹ Thus, the Convention neither compels courts not to enforce annulled awards nor provides guidance as to when enforcement or non-enforcement would be appropriate.

If this were the only relevant language in the Convention applicable to recognition of annulled awards, the ambiguity might not have become so controversial. Interpreting courts might have developed their own standards for when enforcement was appropriate, resulting in some coalescence around general principles. However, the presence of Article VII, necessary language in its own right, makes interpreting the text in Article V more difficult. Article VII affirms that the Convention “shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award . . . [as] allowed by the law or the treaties of the country where such award is sought to be relied upon.”¹⁰² Article VII, through the application of favorable local laws and bilateral treaties, encourages greater enforcement of annulled awards. Article VII’s mandatory “shall,” in contrast to the permissive “may” of Article V, compels courts not to deprive parties of relevant national rights. To the extent that the two Articles point in opposite directions, they arguably conflict with

⁹⁸ See New York Convention, *supra* note 3, at art. V(1)(e).

⁹⁹ See *id.* art. VII.

¹⁰⁰ *Id.* art. V(1)(e) (emphasis added).

¹⁰¹ See *id.*

¹⁰² *Id.* art. VII.

one another in furthering their stated goals.¹⁰³ However, if one were to read the two articles together, the combination of Article V and Article VII creates a strong suggestion that an annulled award may, but does not have to, be denied recognition. Not surprisingly, the result has led to a conflicted body of decisions that attempts to grapple with these provisions.

B. The Chromalloy-TermoRio Divide in the United States and Beyond

In the United States, the conflicting interpretations of Article V and VII have played out prominently through a quartet of federal court opinions. The first of this quartet, and perhaps the most prominent, is the oft-discussed case of *Chromalloy Aeroservices v. Arab Republic of Egypt*.¹⁰⁴ Summarized briefly,¹⁰⁵ Chromalloy contracted with the Egyptian government to provide helicopter maintenance for its air force.¹⁰⁶ Yet two and a half years after the agreement was signed, Egypt terminated the contract.¹⁰⁷ In response, Chromalloy rejected the cancellation and began arbitration proceedings.¹⁰⁸ Chromalloy won, and the arbitration panel ordered the Egyptian government to pay over \$17 million in damages.¹⁰⁹ While Chromalloy's efforts to enforce the award were pending in the United States, Egypt successfully sought nullification from the Egyptian Court of Appeal.¹¹⁰ This left the U.S. court in the uncomfortable position of deciding whether to enforce the arbitrator's decision or to defer to the Egyptian court.

¹⁰³ See, e.g., James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 67 (2004); Ward, *supra* note 85, at 498-99.

¹⁰⁴ 939 F. Supp. 907 (D.D.C. 1996).

¹⁰⁵ *Chromalloy's* machinations are more detailed than this, and numerous other works provide more thorough discussions of the court's opinion. E.g., Davis, *supra* note 80, at 48-50.

¹⁰⁶ *Chromalloy*, 939 F. Supp. at 908.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 908. The Egypt Court of Appeal reasoned that the arbitrators had misapplied Egyptian law. *Id.* at 911. The arbitral panel, when faced with this issue, concluded that it did not matter whether administrative law (which Egypt wanted) or civil law applied to the dispute. *Id.* at 908.

Of significant interest here is the court's interpretation of the Convention. Not surprisingly, the court noted that Article V(1) of the Convention used permissive language, citing the critical word "may" in the phrase "[r]ecognition and enforcement of the award may be refused"¹¹¹ Noting this permissiveness, the court then relied on Article VII, which enables parties to utilize provisions of national law that are more favorable than those in the Convention.¹¹² The court emphasized that while Article V's language was discretionary, Article VII required courts to allow parties to avail themselves of greater rights under local law.¹¹³ The court then examined U.S. law to see if more permissive rights were available and found such rights in the Federal Arbitration Act, which contains a strong public policy toward enforcing international arbitration awards.¹¹⁴ Finding such rights under local law, the court concluded that under U.S. law, the arbitration award was entitled to recognition.¹¹⁵

Chromalloy has taken a beating over the past fifteen years with numerous writers levying sharp criticism against it.¹¹⁶ Some scholars have argued that the Federal Arbitration Act does not apply to international arbitration and that the *Chromalloy* Court should not have relied on it.¹¹⁷ Others have critiqued that *Chromalloy* held that an arbitration clause stating that an award shall be final and not subject to appeal is apparently sufficient to

¹¹¹ *Chromalloy*, 939 F. Supp. at 909.

¹¹² *See id.*

¹¹³ *See id.* at 909-10.

¹¹⁴ *Id.* at 910-12. The Federal Arbitration Act permits awards to be vacated by a court only under very limited circumstances, such as fraud or bias, or when the award was made in "manifest disregard" of the law. *Id.* at 910; *see also* 9 U.S.C. § 10(a)(1)-(4) (2006).

¹¹⁵ *Chromalloy*, 939 F. Supp. at 912, 914.

¹¹⁶ E.g., Nina H. Mohebbi, Comment, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 563 n.54 (2010) (noting that the decision has received heavy criticism) (citing William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L. L. 805, 807 (1999)) (noting that the court reached this conclusion "[i]n an opinion [supported by] neither precedent nor progeny").

¹¹⁷ *See* Nicholas Pengelley, *The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere*, 8 VINDOBONA J. INT'L COM. L. & ARB. 195, 200 (2004).

make a vacated award enforceable.¹¹⁸ However, other notable experts have defended the *Chromalloy* case and reasoning¹¹⁹ or at least advocated for a modified version of the *Chromalloy* approach.¹²⁰ Thus, whether *Chromalloy* is savior or scourge depends upon which author's work you read.

Three years later, two additional decisions followed. In *Baker Marine, Ltd. v. Chevron, Ltd.*,¹²¹ the parties' barge services contact grew acrimonious, and arbitration was pursued via a broad arbitration clause,¹²² resulting in a victory for Baker Marine.¹²³ Chevron and its fellow defendant, Danos and Curole Marine Contractors, sought to vacate the award that Baker Marine was trying to enforce in the Nigerian Federal High Court.¹²⁴ The Nigerian court set aside the award, and Baker Marine attempted to have the arbitration award enforced in the United States.¹²⁵

However, unlike in *Chromalloy*, the court refused to enforce the award.¹²⁶ The court recognized that Article V(1)(e) does not compel a court to respect an annulled award, and the court concluded that no sufficient reason existed to override the judgments of the Nigerian court.¹²⁷ Although the court invoked the same federal arbitration policy as the court in *Chromalloy*, the court held that such policy was simply that arbitration agreements be treated like contracts and that enforcing an annulled award would thwart U.S. arbitration policy.¹²⁸

¹¹⁸ See Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 478 (2000) [hereinafter Drahozal, *Enforcing*].

¹¹⁹ See Pengelley, *supra* note 117, at 200. For an insightful analysis in support of *Chromalloy*, see BORN, *supra* note 5, at 2681-84.

¹²⁰ See Drahozal, *Enforcing*, *supra* note 118, at 453, 478-79.

¹²¹ 191 F.3d 194 (2d Cir. 1999).

¹²² *Id.* at 195. The clause stated that "[a]ny dispute, controversy or claim arising out of this Contract, or the breach, termination or validity thereof, shall be finally and conclusively settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." *Id.*

¹²³ *Id.* at 195-96.

¹²⁴ *Id.* at 196.

¹²⁵ *Id.* at 196-98.

¹²⁶ *Baker Marine*, 191 F.3d at 196-98.

¹²⁷ *Id.* at 197. The court further noted that Baker Marine, the party seeking enforcement, never claimed that the Nigerian court acted contrary to Nigerian law. *Id.*

¹²⁸ *Id.* The court did not analyze whether the arbitration award fell under the limited

That same year, *Spier v. Calzaturificio Tecnica, S.P.A.*¹²⁹ was decided. The *Spier* court, like its predecessors, was asked to recognize an annulled award reached and then set aside in a foreign jurisdiction.¹³⁰ Relying on *Baker Marine* in its interpretation of the Convention, the court declined to enforce the annulled award.¹³¹ The court supported its conclusion by noting that the Italian courts nullified the award because the arbitrators exceeded their powers, a valid ground for nullification under the Federal Arbitration Act.¹³²

While *Chromalloy* remains prominently discussed, *Baker Marine* and *Spier* have been largely overshadowed by *TermoRio S.A. E.S.P. v. Electranta S.P.*¹³³ as representative of courts taking the opposite view to *Chromalloy*.¹³⁴ In *TermoRio*, a Colombian firm agreed to generate and sell electric power to Electranta, a Colombian government entity.¹³⁵ Less than one year later, Colombia sought to sell its electrical company assets to private owners and other Colombian utilities.¹³⁶ As a result, Electranta was left with obligations to TermoRio to buy power but without resources to do so.¹³⁷

TermoRio sought arbitration pursuant to their agreement,¹³⁸ and the arbitration tribunal ordered Electranta to pay TermoRio \$60.3 million.¹³⁹ In response, Electranta filed an “extraordinary writ” in the Colombian courts seeking to overturn the award.¹⁴⁰ The court granted the request, reasoning that the arbitration had to be conducted in accordance with Colombian law, and Colombian

FAA conditions that allow an award to be annulled including the manifest disregard standard. *Id.*; see 9 U.S.C. § 10(a)(1)-(4).

¹²⁹ 663 F. Supp. 871 (S.D.N.Y. 1987).

¹³⁰ *Id.* at 872 (addressing an Italian court decision).

¹³¹ *Id.* at 875.

¹³² *Id.*

¹³³ 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).

¹³⁴ *See, e.g., id.*

¹³⁵ *Id.* at 930.

¹³⁶ *Id.*

¹³⁷ *Id.* at 931.

¹³⁸ *TermoRio*, 487 F.3d at 931.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

law at the time did not expressly permit the use of ICC rules in arbitration proceedings.¹⁴¹ TermoRio's two lawsuits in Colombian courts seeking to rescind the transfer of Electranta's assets to another company were not successful.¹⁴²

TermoRio then sought to enforce the annulled award in the United States.¹⁴³ The D.C. Circuit refused to do so.¹⁴⁴ The U.S. court reasoned that the Colombian court was a competent authority to review the award and nothing in the record revealed that the proceedings were "tainted or that the judgment of that court [was] other than authentic"¹⁴⁵ The court was also asked to enforce the award on public policy grounds; the court responded that it is a mistake to suggest "that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e)."¹⁴⁶ The court ruled that to be overturned on public policy grounds, a judgment would have to be "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought," explaining that "[t]he standard is high, and infrequently met," and concluding that it should be used "[o]nly in clear-cut cases ought it to avail the defendant."¹⁴⁷

To the extent that such a conflict exists,¹⁴⁸ the *TermoRio-Chromalloy* divide has been evaluated by some as an initial discretionary perspective towards enforcing annulled awards (*Chromalloy*) being gradually whittled away by subsequent cases (*Baker Marine*, *Spier*) with a final appellate opinion (*TermoRio*) isolating *Chromalloy* to its facts.¹⁴⁹ However, in some quarters the

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *TermoRio*, 487 F.3d at 931.

¹⁴⁴ *Id.* at 932.

¹⁴⁵ *Id.* at 935.

¹⁴⁶ *Id.* at 937.

¹⁴⁷ *Id.* at 938.

¹⁴⁸ The *TermoRio* decision did not explicitly evaluate *Chromalloy* but instead distinguished it on the grounds that "an express contact provision was violated by pursuing an appeal to vacate the award." *Id.* at 937.

¹⁴⁹ As two arbitration specialists explain:

Because the D.C. Circuit distinguished *Chromalloy* on the basis of different contract provisions, it was unnecessary to decide whether the *Chromalloy*

divide these two opinions represent runs much deeper. Pedro J. Martinez-Fraga, author of a recent book on the American influence on international commercial arbitration, comments that “[t]he [*TermoRio*] opinion is comprehensive and particularly impressive because . . . it fully integrates . . . an analysis resting on eleven fundamental premises and no fewer than seven policy considerations.”¹⁵⁰ Noting that the court “deftly addressed”¹⁵¹ the conflicting underlying policies between Article V(1)(e) and Article VII, the author concluded that “[t]he *TermoRio* opinion is fundamentally positive in that it appears to have reached the right result.”¹⁵²

By contrast, Gary Born, author of the well-known treatise *International Commercial Arbitration*, writes to bury *TermoRio*, rather than praise it.¹⁵³ According to Born, this “very unsatisfactorily” reached decision is “fundamentally mistaken.”¹⁵⁴ The Colombian court’s annulment of an arbitration agreement because it considered using ICC rules to be *per se* invalid represents “one of the most egregious violations of the Convention’s requirement that Contracting States recognize

decision was correct. The effect of this, however, was to limit *Chromalloy*’s continuing effect to the most narrow of circumstances: namely, when there is a violation of express contractual language prohibiting an appeal of awards. It seems reasonably likely to us that, if it had been necessary to do so, the D.C. Circuit would have expressly disapproved of *Chromalloy*.

The rule regarding annulled awards now seems clear: the secondary court should defer to the decision of the court that annulled or set aside the award, except in those rare cases that the judgment is “repugnant to fundamental notions of what is decent and just.” It is also clear that the court with primary jurisdiction to review an award may annul or set it aside on any basis permitted by its national jurisprudence. Given the high public policy hurdle, it may be a rare case in which an award previously annulled or set aside will be later enforced.

Jonathan I. Blackman & Ellen London, *Respecting Awards Annulled at the Seat of Arbitration: The Road from Chromalloy to TermoRio*, 63 DISP. RESOL. J. 70, 75 (2008).

¹⁵⁰ PEDRO J. MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS* 180 (2009).

¹⁵¹ *Id.* at 183.

¹⁵² *Id.* at 186.

¹⁵³ See BORN, *supra* note 5, at 2683-87.

¹⁵⁴ *Id.* at 2685-86.

arbitration agreements that can be hypothesized.”¹⁵⁵ Born thus concludes that *TermoRio*’s reliance on this Colombian “decision is gravely mistaken and itself a likely violation of the Convention’s obligations.”¹⁵⁶

Only amplifying this divide is the divergent treatment of the enforcement of annulled awards on a global scale. The permissive *Chromalloy* case appears restrictive when compared to the treatment of annulled awards in French courts.¹⁵⁷ French courts have long held that awards annulled in other countries may be readily enforced on French soil.¹⁵⁸ Under French law, the grounds for annulling an arbitration awards are narrower than those of the Convention.¹⁵⁹ The French court’s position rests exclusively on the text of Article VII which states: “[T]he Convention shall not deny a party of more favorable rights of recognition and enforcement under the law of the country where the award is sought to be relied upon.”¹⁶⁰

The long-running and popular saga of *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation (OTV)*¹⁶¹ highlights this practice. Stated briefly, an English firm contracted with a French company to help it obtain a government contract in Algeria.¹⁶² OTV only paid half its bill, and Hilmarton sought a remedy pursuant to the arbitration clause in the contract under ICC rules in Switzerland.¹⁶³ In arbitration, Hilmarton lost.¹⁶⁴ Hilmarton appealed to the Swiss courts, whose highest court affirmed the

¹⁵⁵ *Id.* at 2687.

¹⁵⁶ *Id.*

¹⁵⁷ Compare *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 912 (D.D.C. 1996), with *Cour de Cassation [Cass.]*[Supreme Court for Judicial Matters] le civ., Mar. 23, 1994, reprinted in 1994 *Revue de l'Arbitrage* 327, 327-28 (Fr.).

¹⁵⁸ BORN, *supra* note 5, at 2677.

¹⁵⁹ See *id.* at 2678; NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1502 (Fr.).

¹⁶⁰ Silberman, *supra* note 16, at 28 n.9 (citing New York Convention, *supra* note 3, art. VII).

¹⁶¹ 1994 *Revue de l'Arbitrage* at 327.

¹⁶² GHARAVI, *supra* note 78, at 119.

¹⁶³ See *id.* at 120.

¹⁶⁴ See *id.*

lower appellate court's annulment denying Hilmarton's claim.¹⁶⁵ OTV sought enforcement of the award in France and, notwithstanding the Swiss decision, the French court enforced the award.¹⁶⁶

Not to be outdone, Hilmarton sought to enforce the Swiss court's annulment of the arbitration award in France, and a French court in Nanterre recognized the Swiss court's annulment.¹⁶⁷ The dispute was resubmitted for arbitration in Switzerland, and a new arbitration award was granted in favor of Hilmarton.¹⁶⁸ Hilmarton sought to enforce this new and favorable award in France,¹⁶⁹ and the French court agreed to enforce it.¹⁷⁰

As a result, at one point there were two conflicting awards in the French courts, one enforcing the original award where Hilmarton lost, the other enforcing the second award where Hilmarton won.¹⁷¹ Apparently the French courts had no problem with this, as they held it did not violate French public policy and stated that parties could use French civil procedure to annul one of the existing decisions.¹⁷² Ultimately, the French courts resolved the conflict by dismissing the judgments in favor of Hilmarton.¹⁷³ However, one award still remained in force in England where it was granted enforcement by England's High Court.¹⁷⁴

The *Hilmarton* saga shows just how convoluted and conflicting arbitration awards can become when a national court affords itself the full recognition powers of Article VII with no limitation by the permissive set aside standards in Article V(1)(e). In short, French courts "appear to accord no weight to decisions of foreign courts, including the arbitral seat, annulling an arbitral

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* The Appellate Court upheld the enforcement of the award by the lower court, and the French Supreme Court affirmed the Appellate Court's decision. *Id.*

¹⁶⁷ GHARAVI, *supra* note 78, at 120.

¹⁶⁸ *Id.* at 120-21.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.* at 120.

¹⁷² GHARAVI, *supra* note 78, at 121.

¹⁷³ *Id.* at 122.

¹⁷⁴ *Id.* at 122. *See also* Omnium de Traitement et de Valorisation S.A. v. Hilmarton LTD, [1999] 2 Lloyd's Rep. 222 (Eng.).

award.”¹⁷⁵ All that matters is that its national New Code of Civil Procedure Article 1502 is satisfied.¹⁷⁶

Such a self-centered perspective impairs the harmony of international relations.¹⁷⁷ More importantly for international firms, it impedes the smooth functioning of international dispute resolution. If more countries adopted the French system, firms would have difficulty ascertaining when an arbitration dispute is truly complete.¹⁷⁸ Appeals would inevitably be filed in the most permissive jurisdiction. As in *Hilmarton*, conflicting judgments across, and even within, national boundaries could plague the planning and decision-making of global organizations. Thus, the divergence of opinion on the interpretation of the Convention is not just a U.S. phenomenon, but it is a global problem in need of a long term resolution.

IV. Toward a “New” Convention

The widespread controversy over the propriety of the enforcement of annulled arbitration awards has necessitated revisions that would reconcile these conflicts and offer a uniform

¹⁷⁵ BORN, *supra* note 5, at 2680.

¹⁷⁶ *Id.* As one author explains bluntly:

The problem with the *Hilmarton* jurisprudence . . . is that one loses any sense of right and wrong in the procedural technicalities. . . . The court seems to be upholding a double standard: an international award cannot be conclusively integrated in the legal order of the rendition forum but can be so in the enforcement forum. Put crudely, the French position would be that an international relative currency of awards is acceptable so long as it is kept out of its backyard.

Georgios C. Petrochilos, *Enforcing Awards Annulled in Their State of Origin Under the New York Convention*, 48 INT'L & COMP. L.Q. 856, 870 (1999).

¹⁷⁷ GHARAVI, *supra* note 78, at 123 (“This . . . attitude constitutes nothing but a return to the principle of absolute territorialism according to which ‘no sovereign is obliged to give effect to laws and judgments of foreign sovereigns.’”) (quoting Pierre Mayer, *L'Etat et le droit international privé*, 16 DROITS. REVUE FRANÇAISE DE THÉORIE JURIDIQUE 33, 39 (1992)).

¹⁷⁸ France is not the only nation that takes a relatively permissive view towards enforcement. *Id.* at 87-92 (describing case law in Belgium and Austria); *see also* BORN, *supra* note 5, at 2680-81 (noting examples of Belgian and Austrian courts recognizing foreign annulled arbitration awards).

approach. Other revisions have been proposed,¹⁷⁹ but perhaps the most important effort has been led by Albert Jan van den Berg.¹⁸⁰ Professor van den Berg is arguably the world's leading expert on the Convention and is at the forefront of the calls for change and modernization.¹⁸¹ His effort offers a revision that could materially impact how the Convention is interpreted.¹⁸²

The revision, termed the "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and

¹⁷⁹ For example, the American Law Institute (ALI) has authored a worthwhile proposal in its Restatement (Third) of the U.S. Law of International Commercial Arbitration. *See Projects, Restatement Third, The U.S. Law of International Commercial Arbitration*, AMERICAN LAW INSTITUTE CURRENT, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20 (last visited Mar. 22, 2012). The project began in 2007 and a tentative draft was approved at the ALI's 2010 annual meeting. *Id.* Section 5-12 of the Restatement addresses award set aside proceedings for arbitration awards. RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARB. § 5-12 (Proposed Official Draft 2011). In this draft, the ALI propose a restrictive enforcement climate more similar to that held in *TermoRio* than *Chromalloy*, whose reasoning ALI explicitly declines to adopt. The Restatement permits enforcement of a set aside award if the foreign authority was not competent to do so or if the award was otherwise not entitled to recognition. *See id.* at § 5-12 cmt. d (Proposed Official Draft 2011). The Restatement also permits enforcement under "extraordinary circumstances" which might exist if the court "knowingly and egregiously departed from the rules governing set-aside in that jurisdiction" or if "other facts give rise to substantial and justifiable doubts about the integrity or independence of the foreign court with respect to the judgment in question." *Id.* The Reporter's notes also foreclose Article VII of the Convention from overwhelming the set-aside restrictions in Article V. *Id.* at § 5-12 n. d. The notes state that, notwithstanding the "imperative language 'shall not . . . deprive' in Article VII, that provision does not apply if there exists within the jurisdiction no alternative regime applicable to the Convention award in question. For Convention awards, Chapter One of the FAA does not constitute such an alternative regime." *Id.* (quoting New York Convention, *supra* note 3).

¹⁸⁰ Professor van den Berg is a Professor at Law and the Arbitration Chair at Erasmus University in Rotterdam, but currently he is a visiting Professor of Law at the University of Miami. He has also served as President of the Netherlands Arbitration Institute. Albert Jan van den Berg, UNIV. OF MIAMI SCH. OF LAW, <http://www.law.miami.edu/facadmin/visiting/avandenberg.php> (last visited Mar. 30, 2011).

¹⁸¹ SIMON GREENBERG, CHRISTOPHER KEE & J. ROMESH WEERAMANTRY, *INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE* 430 (2011).

¹⁸² Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (May 2008), available at http://www.arbitration-icca.org/media/0/12133674097980/hypothetical_draft_convention_ajbrev06.pdf [hereinafter van den Berg, *Draft Convention*].

Awards,” (“Draft Convention”) arises from an assessment of the Convention at the 2008 International Council for Commercial Arbitration Conference.¹⁸³ While the proposed modifications are significant, they do not undermine the Convention’s core purposes. The goals of increasing recognition of arbitration agreements and facilitating enforcement of arbitral awards remain intact.¹⁸⁴ Instead, the revision stems from a need for modernization of key provisions to account for prevailing legal interpretations and business practices.¹⁸⁵ According to Professor van den Berg, a number of provisions need to be added, revised, or clarified.¹⁸⁶ These provisions include defining the scope for which a court can refer cases to arbitration under Convention Article II (3),¹⁸⁷ clarifying what is meant by the clause “duly authenticated original award” in Article IV(1)(a),¹⁸⁸ and deleting a reference to “permanent arbitral bodies” in Article I(2),¹⁸⁹ which was apparently an allusion to arbitration occurring before trade

¹⁸³ See Marike R.P. Paulsson, *The Miami Draft: the Good Twin of the NYC*, KLUWER ARBITRATION BLOG, (Oct. 7, 2010), <http://kluwerarbitrationblog.com/blog/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/>. Professor van den Berg presented the keynote address at the conference where he discussed his proposed revisions to the New York Convention. See *ICCA Conference Program*, INT’L COUNCIL FOR COMMERCIAL ARBITRATION (2008), available at <http://www.arbitration-icca.org/media/0/12785538967010/icca-dublin-2008.pdf>.

¹⁸⁴ See Albert Jan van den Berg, *A Closer Look at the Proposed “New New York Convention”*, 3 GLOBAL ARB. REV. 14, 14 (2008) [hereinafter van den Berg, *Proposed “New New York Convention”*] (“The object and purpose of the Draft Convention are the same as for the New York Convention: to facilitate the enforcement of the arbitration agreement and arbitral award as much as possible.”); Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395, 407 (2006); ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 6-9 (1981).

¹⁸⁵ See Paulsson, *supra* note 183 (“The drafters of the Convention in 1958 could never have been able to produce a text that would foresee the issues which we confront in 2010, no more than the founding fathers of the US Constitution could have anticipated the world wide web.”).

¹⁸⁶ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, INT’L COUNCIL FOR COMMERCIAL ARBITRATION (May 2008), available at http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf [hereinafter van den Berg, *Explanatory Note*].

¹⁸⁷ *Id.* at 1.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2.

tribunals in communist countries.¹⁹⁰ The portions of the Draft Convention most relevant to this manuscript, Articles 5 and 7, are reproduced at the end of this article with comparisons to the original Convention text.¹⁹¹

Perhaps not surprisingly, the Draft Convention revises the controversial Convention provisions governing enforcement of annulled arbitration awards. As noted earlier, the permissive word “may” in Article V(1)(e) of the Convention has enabled courts in various countries, including the United States, to enforce an arbitration award even though the award was annulled by a national court in the country where the arbitration took place.¹⁹² Instead, the Draft Convention states, in relevant parts:

Article 5 – Grounds for Refusal of Enforcement

3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:

...

(g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph[.]¹⁹³

Embedded within this short revision is a significant and useful clarification regarding enforcement of annulled awards. Professor van den Berg takes a middle road between various scholarly and judicial proposals. The Draft Convention avoids a robust prohibition on the enforcement of awards annulled in another jurisdiction, as some scholars have suggested.¹⁹⁴ This position is

¹⁹⁰ Leonard V. Quigley, *Accession by the United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049, 1061 (1961); see also Lazare Kopelmanas, *The Settlement of Disputes in International Trade*, 61 COLUM. L. REV. 384, 392 (1961) (noting that the provision was inserted at the request of the Soviet delegation in order to guarantee that “agreements to arbitrate before the Arbitral Commissions in eastern Europe will be respected by the signatory states and their national courts”).

¹⁹¹ See *infra* Appendix Figures 1-2.

¹⁹² See *supra* Part III.B.

¹⁹³ van den Berg, *Draft Convention*, *supra* note 182, art. 5(3)(g).

¹⁹⁴ See, e.g., WILLIAM M. REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION & ARBITRATION: BREAKDOWN AND REPAIR* 114 (1992) (“[O]nce an award

one roughly similar to that taken in *TermoRio*, holding that, unless proceedings were tainted or the judgment inauthentic, a secondary court could not enforce an annulled award that has been lawfully set aside by a competent authority.¹⁹⁵

Such a prohibition, however, could imply refusal of enforcement regardless of the situs court's reasoning, conceivably allowing annulments based upon self-serving local interests to stand unchallenged. While this is certainly problematic, of significant concern is the practice of courts routinely enforcing arbitration awards that have been set aside without meaningful limitation. Such freewheeling enforcement that elevates the policies of the enforcement jurisdiction over the courts in the arbitral situs creates a "lack of uniform reaction" that "among the foreign countries could be disastrous."¹⁹⁶

has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else. Once a venue or a governing law is selected, the [New York] convention gives to it a primacy with regard to validity of an award."). Professor van den Berg implied a similar theory in passing in an older article. See Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 42 (1986) ("[I]f the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case they must refused recognition and enforcement of the award.").

¹⁹⁵ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007). The court explained:

Pursuant to [article V(1)(e)] of the Convention, a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a "competent authority" in the primary Contracting State. Because the Consejo de Estado is undisputedly a "competent authority" in Colombia (the primary State), and because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, appellees contend that appellants have no cause of action under the FAA or the New York Convention to enforce the award in a Contracting state outside of Colombia. On the record at hand, we agree.

Id. The court left open a narrow "public policy" exception stating that a judgment is unenforceable when it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Id.* (quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)).

¹⁹⁶ Pierre Mayer, *Revisiting Hilmarion and Chromalloy*, in INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY 172 n.22 (Albert Jan van den Berg ed., 2001).

The Draft Convention prevents such unbridled enforcement and, perhaps this is where the challenge lies; it carefully limits enforcement of annulled awards to paragraphs (a) through (e) of Article V of the Convention.¹⁹⁷ These reasons include invalidity of the agreement, lack of notice, improper scope of the award, improper procedure followed, and binding nature of the award.¹⁹⁸ Given that the Draft Convention does not substantially modify these grounds from the Convention language drafted in 1958,¹⁹⁹ these grounds should be non-controversial to reviewing courts.

A. Improvements over the Current Convention

The Draft Convention system improves upon the current regime. The Draft Convention increases the emphasis on the primary jurisdiction.²⁰⁰ Courts from the arbitral situs will now have greater control over arbitration awards issued in their jurisdiction. The Draft Convention also lessens contradictory results. Under the Draft Convention, an enforcement court will be much less likely to interfere with the decision of the primary jurisdiction; thus, there will be fewer instances of contradictory judgments to confuse and muddle the literature. Interpreting courts will be able to more quickly harmonize around a single set of standards that interpret the Convention, rather than having national splits over the discretion of enforcing courts.

Parties will also have greater control under the Draft Convention. Firms cannot likely eliminate the risks of arbitration, but with greater control that firms can assert over the arbitration process, the more effectively arbitration risk can be assessed. The Draft Convention more clearly affirms which court system will govern the arbitration process should the judiciary be forced to intervene. Contracting firms, who have already agreed to submit their disputes to a particular jurisdictional tribunal if one arises,

¹⁹⁷ See *infra* Appendix Figure 1.

¹⁹⁸ Paragraphs (a) through (e) of the Convention and the Draft Convention are largely similar to one another. Compare New York Convention, *supra* note 3, at art. V(1)(a)-(e), with van den Berg, *Draft Convention*, *supra* note 182, at art. V(1)(a)-(e); see also *infra* Appendix Figure 1.

¹⁹⁹ See *infra* Appendix Figure 1.

²⁰⁰ Compare New York Convention, *supra* note 3, art. V(1)(a)-(e), with van den Berg, *Draft Convention*, *supra* note 182, art. V(1)(a)-(e); see also *infra* Appendix Figure 1.

will be more confident that the agreed upon tribunal and its associated rules will resolve the disagreement. Firms with a clearer assessment of arbitration costs can thus more precisely evaluate whether a business decision should be undertaken.

Furthermore, litigation costs would decrease as parties who found their awards annulled would be less likely to challenge that annulment in another court. The *Hilmarton* case shows how financially taxing a lengthy dispute over an arbitration award can get.²⁰¹ The Draft Convention's narrow and clear grounds would deter losing parties from 'forum shopping' to obtain a favorable remedy.²⁰²

The Draft Convention also furthers finality in dispute resolution. Under this system, the annulment of the award is in most cases the final resolution of the arbitration process.²⁰³ If enforcement of annulled awards is narrowly circumscribed, firms participating in arbitration can expect that the dispute will begin and end in the same jurisdiction within a specified cost and period of time.

Also, the likelihood of dual litigation arising from arbitration is minimized. The constant threat of litigating the same dispute in multiple forums hangs over every international business conflict. Dual litigation can generate conflicting judgments and create a troubling lack of certainty that can hobble a firm's continuing

²⁰¹ See *supra* text accompanying notes 161-76.

²⁰² Professor van den Berg has mentioned his disapproval of the enforcement of annulled awards in the *Hilmarton* case, calling the French practice "an undesirable development." Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 ICC INT'L CT. ARB. BULL. 1, 16 (2007). Also, Professor van den Berg notes in the article his change of opinion from supporting the current Convention to asserting that it is in need of revision:

In my previous contributions, I took the view that the text and structure of the Convention do not seem to be at stake. However, I am no longer so certain of this. The question is not so much whether the 10% of refusals can be avoided, but rather that we should not be complacent with a text and a structure now 50 years old. The wear and tear they are undergoing might indeed be good reason to consider revamping or indeed replacing the Convention.

Id. at 35.

²⁰³ See *infra* Appendix Figure 1-2.

operations.²⁰⁴ Dual litigation can also place a heavy financial burden that drains money and time from business operations.²⁰⁵ To the extent that enforcement of annulled arbitral awards present a real risk, the risk dilutes the certainty and values of arbitration.²⁰⁶ Reducing the ability for *Hilmarton*-style dual litigation involving the enforcement of annulled awards, as the Draft Convention proposes,²⁰⁷ reinforces these values.

Finally, Draft Convention language more closely harmonizes with other Arbitration Conventions on the enforcement of annulled awards. For example, the European Convention on International Commercial Arbitration (“ECICA”) is a convention that governs commercial relations for participating European member states.²⁰⁸ Before the United Nations Conference in New York that developed the Convention,²⁰⁹ the ECICA drafters sought to salvage commercial transactions between Eastern and Western Europe at a time when communist and capitalist states were increasingly hostile toward one another.²¹⁰

²⁰⁴ See Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 244-47 (2010). See also N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 610 (2006) (“[T]here is almost nothing in principle to support the maintenance of concurrent, parallel proceedings in the courts of different countries.”); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1064 (1994) (“Many of the costs of duplicative litigation are self-evident. It is patently wasteful.”).

²⁰⁵ See Parrish, *supra* note 204, at 245.

²⁰⁶ Cf. Robert C. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project’s Proposed Federal Foreign Judgments Statute*, 45 NEW. ENG. L. REV. 63, 72 (2010) (discussing the value of finality in the context of court judgments both in the conservation of judicial resources and in the avoidance of inconsistent judgments).

²⁰⁷ See van den Berg, *Draft Convention*, *supra* note 182.

²⁰⁸ See European Convention on International Commercial Arbitration of 1961 art. IX (2), Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter ECICA]. The ECICA currently “has 31 members, including most EU states and several non-EU members such as Russia.” Christian W. Konrad, *Buried in Oblivion? The Significance and Limitations of the European Convention on International Commercial Arbitration*, KLUWER ARBITRATION BLOG (Nov. 2, 2010), <http://kluwerarbitrationblog.com/blog/2010/11/02/buried-in-oblivion-the-significance-and-limitations-of-the-european-convention-on-international-commercial-arbitration/>.

²⁰⁹ See CLAUDIA ALFONS, RECOGNITION AND ENFORCEMENT OF ANNULLED FOREIGN ARBITRAL AWARDS 53 (2010).

²¹⁰ See *id.*

Like the Convention, the ECICA articulates grounds where the setting aside of an arbitration award in one jurisdiction impacts enforcement in another.²¹¹ These grounds, including party incapacity, agreement invalidity, violation of due process, excess arbitrator authority, and irregularity in procedures, are present in both the Convention²¹² and the ECICA.²¹³ However, the ECICA uses the mandatory "shall" instead of the permissive "may," which is used by the Convention.²¹⁴ This approach establishes that an award annulment or set aside in the arbitral state shall be the basis of denying recognition or enforcement in another state only if the arbitral state annulled or set aside the award on the grounds listed in the ECICA. The ECICA does not require recognition and enforcement of awards from foreign arbitration.²¹⁵ Instead, it "provides negatively that annulment may be a basis for non-recognition only in specified instances."²¹⁶

The Draft Convention harmonizes with the ECICA in that, like its European counterpart, it limits the grounds under which an award will be refused to specified circumstances.²¹⁷ Furthermore, the Draft Convention compensates for the more limited scope of the ECICA in this area. The ECICA was intended to supplement, and not overtake, the Convention.²¹⁸ For historical reasons, the ECICA focuses mainly on arbitral process and remains silent on the mechanism of enforcement,²¹⁹ leaving that issue to the broader

²¹¹ See ECICA, *supra* note 208, art. IX (1).

²¹² See New York Convention, *supra* note 3, art. (V)(1)(a)-(d).

²¹³ See ECICA, *supra* note 208, art. IX (1); Konrad, *supra* note 209.

²¹⁴ See ECICA, *supra* note 208, art. IX (1) ("The setting aside in a Contracting State of an arbitral award covered by this Convention *shall* only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons . . .") (emphasis added).

²¹⁵ See BORN, *supra* note 5, at 2340.

²¹⁶ *Id.*

²¹⁷ See van den Berg, *Draft Convention*, *supra* note 182, at art. 5(3)(a)-(h).

²¹⁸ See Konrad, *supra* note 208.

²¹⁹ The emphasis on process originates from the political and commercial context in which the ECICA was drafted. At the time, ineffective arbitration agreements, particularly between Eastern and Western European firms, caused "grave problems . . . in the context of the arbitration procedure." ALFONS, *supra* note 209, at 53-54. Given these problems and the recent passage of the Convention, the ECICA drafters decided to give "particular focus on the arbitral process *per se*." *Id.* at 54.

Convention. The Draft Convention picks up the ECICA's jurisprudential slack and unequivocally supports a policy in favor of enforcement, stating that enforcement of an award shall not be refused except for its listed grounds.²²⁰ Thus, the Draft Convention both endows greater specificity of enforcement upon the ECICA while at the same time synchronizing its grounds for set-aside with ECICA language.

B. Criticism of the Need for a Revised Convention

In spite of the many advantages of the Draft Convention, it has also attracted criticism from contemporary scholars.²²¹ One author has neatly encapsulated these criticisms into three arguments: "there is no need, no hope, and no danger."²²²

The first rationale for non-revision is that the major issues plaguing the enforcement of arbitral awards have no need to be resolved through changes to the Convention. Changes tightening enforcement provisions will do little to eliminate bias in favor of local companies.²²³ Russian courts, for example, have shown little interest in enforcing awards that negatively impact the interests of large state-owned enterprises.²²⁴ A biased judiciary could circumvent the Draft Convention by imposing its will through the "public policy" exception to enforcement present in both the Convention²²⁵ and the Draft Convention.²²⁶ Revision would also

²²⁰ van den Berg, *Draft Convention*, *supra* note 182, art. 5(1) ("Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.").

²²¹ For one unusually florid critique, see V.V. Veeder, *Is There a Need to Revise the New York Convention?*, 1 J. INT'L DISP. SETTLEMENT 499, 499 (2010). Veeder manages in a single short speech, to light-heartedly compare the New York Convention to the Ten Commandments, Jan van den Berg to Napoleon, and his Draft Convention to a "lame old nag" at best and "cat-food" at worst. *Id.* at 499, 501, 506.

²²² Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 689, 690 (Albert Jan van den Berg ed., 2009) [hereinafter Gaillard, *The Urgency*].

²²³ The Honorable Jose A. Cabranes of the U.S. Court of Appeals for the Second Circuit stated that "[a]rbitration is uniquely well-suited to international commercial disputes because it helps parties avoid bias from local tribunals." *AAA Hosts Int'l Arbitration Day*, 52 DISP. RESOL. J. 4, 4 (1997).

²²⁴ See Gaillard, *The Urgency*, *supra* note 222, at 690-91.

²²⁵ See New York Convention, *supra* note 3, art. (V)(2)(b).

not suppress arbitrator bias, meaning the body of neutrals has been accused of being oligarchic, insular, and vulnerable to incentives to favor repeat players in arbitration proceedings.²²⁷

The second argument posits that revisions should not be pursued because there is no hope of a revised adoption. In spite of its flaws, the Convention has the advantage of long-standing legitimacy. If a revised Convention were to be formally proposed, unexpected controversies might emerge and nations could use the revived discussion as an excuse to opt out by choosing not to sign the new draft.²²⁸ It has taken decades to assemble the nearly 150 nations that are now parties to the current Convention.²²⁹ Cobbling together broad consensus to a new convention during the next fifty years might be nearly impossible.²³⁰

Reinforcing this lack of hope is the fact that arbitration is much more prevalent, and thus much more important, than it was fifty years ago. Nations might see this redrafting as an opportunity to reassert their national interests. If the arbitration “stakes” are higher now than they were decades ago, nations might object to provisions that would not have otherwise provoked scrutiny in the 1950s. Amplifying this problem is that nations themselves are now participating in arbitration proceedings through investment treaties.²³¹ State representatives do not simply see arbitration as a facilitator for business but perceive themselves as potential defendants in an arbitration proceeding.²³² Defendants are generally not keen on enhancing the enforcement process of

²²⁶ See van den Berg, *Draft Convention*, *supra* note 182, art. (5)(3)(h).

²²⁷ See LUTTRELL, *supra* note 58, at 4-5. The author harshly notes that the international arbitration community “is regularly described as a mafia.” *Id.* at 5 (quoting Y. DEZALAY & B.G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANS-NATIONAL LEGAL ORDER* 50 (1996)).

²²⁸ See ALFONS, *supra* note 209, at 177.

²²⁹ See Lipe & Tyler, *supra* note 84, at 37-38.

²³⁰ See Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1138 (2002) (“[A]ny attempt to revise the New York Convention might jeopardize the level of success that has been achieved in the forty-plus years since its enactment.”).

²³¹ See, e.g., Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 771 (2011) (noting dramatic increase in number of investment treaty arbitrations and that “[b]illions of dollars . . . are at stake[.]”).

²³² See Gaillard, *supra* note 222, at 692.

awards through clarification or any other means.²³³ Thus, today, firms are impacted not only by Convention rules, but by nations as well.

Finally, leaving the Convention unmodified imposes no danger on future international commercial arbitration. The Convention in its current state can accommodate “the evolution of arbitration law” because it only “sets a minimum standard.”²³⁴ States can adopt additional standards as they deem necessary. Other nations, like France, do not regularly use the Convention because its domestic laws are more flexible.²³⁵ According to this argument, states can apply or ignore the Convention as they see fit.

These concerns are certainly legitimate. The process of revising a well-established convention is a time-consuming endeavor and would certainly result in the non-adoption of a number of participating nations, at least in the short term. Furthermore, revision cannot resolve a number of pressing problems that face arbitration.

However, Professor van den Berg’s proposal is commendable, and the arguments in favor of adopting his Draft Convention remain compelling. First, Professor van den Berg’s writings and the surrounding literature reveal that a genuine need exists to revise the Convention.²³⁶ Three examples of such revisions are listed earlier in this paper.²³⁷ The Draft Convention makes dozens of other changes that clarify, modernize, or add provisions.²³⁸ Even opponents to revision agree that the Convention’s current

²³³ See *id.*

²³⁴ *Id.*

²³⁵ See *id.*; Veeder, *supra* note 222, at 505.

²³⁶ See van den Berg, *Explanatory Note*, *supra* note 186, at ¶¶ 1-4; see also Jerry Clark, *Opportunity Knocks – The Role of International Trade Arbitration in Reducing International Trade Barriers and Addressing Environmental Concerns*, 13 CURRENTS: INT’L TRADE L.J. 41, 48 (2004) (proposing revision to better define “notions of morality and justice” and “to allow for a first level appeal process through international arbitral tribunals” before reaching the judiciary).

²³⁷ See *supra* text accompanying notes 188-91.

²³⁸ See generally van den Berg, *Explanatory Note*, *supra* note 186 (explaining changes the Draft convention makes to the New York Convention). Albert Jan van den Berg created a side-by-side comparison of the New York Convention and the Draft Convention, including a brief explanation of the proposed changes. van den Berg, *Proposed “New New York Convention”*, *supra* note 184, at 15-20.

language leaves room for improvement.²³⁹

The need for revision apparently cannot be readily circumvented through other methods. One suggestion has been to use the UNCITRAL Model Law in International Commercial Arbitration of 1985 (Model Law),²⁴⁰ a uniform set of arbitration laws designed to be adopted by national governments to create uniform arbitration laws across jurisdictions.²⁴¹ The Model Law, however, is in the same need of reform as the Convention, as the drafters intended for the language of the Model Act to be similar to that of the Convention.²⁴² Furthermore, fewer than half the number of states that have adopted the Convention have adopted the Model Law.²⁴³

Some have suggested repairing the Convention through interpretive recommendations,²⁴⁴ but this too may be insufficient. Such interpretations might, if presented through learned or legitimized sources, influence some courts in interpretation; however, such interpretations might not be effective if they expound on subjects that are not expressly presented in the Convention or that directly conflict with the Convention's language. A detailed textual structure might benefit from the linguistic gap-filling an interpretation might provide, but the

²³⁹ E.g., Gaillard, *The Urgency*, *supra* note 222, at 690 n.4; Emmanuel Gaillard, *Is There a Need to Revise the New York Convention?*, 2 DISP. RESOL. INT'L 187, 188 (2008) (noting that the New York Convention has room for improvement and that such improvement is technically feasible).

²⁴⁰ UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2006).

²⁴¹ See Harpreet Kaur, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261, 276 (2010).

²⁴² See van den Berg, *Proposed "New New York Convention"*, *supra* note 184, at 14. This includes the controversial New York Convention article V(1)(e), which addresses the enforcement of annulled arbitration awards in other jurisdictions. See Amina Dammann, *Vacating Arbitration Awards for Mistakes of Fact*, 27 REV. LITIG. 441, 452-53 (2008) (noting the similarity).

²⁴³ See *Status, 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_stat.us.html (last visited Mar. 30, 2012).

²⁴⁴ See Veeder, *supra* note 221, at 504 ("[A]ll of [van den Berg's proposals in the Draft Convention] are essentially capable of resolution by treaty and legislative interpretation without requiring any actual change of wording in the text of the New York Convention.").

briefly-worded Convention lacks the detail that could benefit most from non-binding textual development.

In addition, textual interpretations might lack the legitimizing contagion effect that national adoption of a treaty might imbue on a revised Convention. If a small number of nations whose courts and enterprises are highly involved in the commercial arbitration process support a revised Convention, other nations may be encouraged to follow.²⁴⁵ Recommendations from academics or interested organizational bodies, no matter how thoughtful, might not trigger that spark of diffusion upon which a widely-adopted treaty can be based.²⁴⁶

Second, the difficulties present in revising the Convention are indeed real. A revision to the Convention will require significant time, effort, and resources. In 2008, Professor van den Berg wrote that the second edition of his influential 1981 book on the Convention,²⁴⁷ due to be published in 2012,²⁴⁸ “may well appear prior to a new New York Convention.”²⁴⁹ That prediction is correct, and, indeed, a “new New York Convention” might not appear for many years. However distant the goal might be, and however challenging the problems that accompany it, the reward of a new convention appears worth the effort, and movement toward this convention should commence without delay.

Previous drafters could have faced the same disillusionment when dealing with the difficulties of adopting new language in

²⁴⁵ See Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 839-41 (2005) (describing the diffusion of norms through states and the role of treaties). One such obvious national candidate for legitimization is the United States. See generally Alford, *supra* note 12 (discussing numerous reasons why the United States holds substantial influence over international arbitration). Another source of legitimization might be Asian countries, who over the past thirty years have dramatically warmed their climate toward international arbitration. See GREENBERG, *supra* note 181, at 34-43.

²⁴⁶ But cf. Rachel Good, *Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty*, 9 NW. J. INT'L HUM. RTS. 209, 218 (2011) (describing how treaty authors' receipt of the Nobel Prize for Peace spurred momentum for over one hundred nations to sign the Mine Ban Treaty the day it became available for signature).

²⁴⁷ See van den Berg, *Proposed “New New York Convention”*, *supra* note 184, at 21.

²⁴⁸ See *Court Decisions*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/court-decisions> (last visited Mar. 22, 2012).

²⁴⁹ van den Berg, *Proposed “New New York Convention”*, *supra* note 184, at 21.

international arbitration. Arbitration has existed around the world since mythology.²⁵⁰ Greek gods Poseidon and Helios resolved cross-national disputes over ownership of Corinth.²⁵¹ Use of commercial arbitration existed through the Roman Empire and the Middle Ages,²⁵² by the turn of the twentieth century, various nations had developed their own arbitration rules,²⁵³ and multinational treaties governing commercial arbitration had already begun to appear.²⁵⁴ Like their counterparts today, drafters certainly had a difficult road ahead to create a contemporary legal framework for an international arbitration convention. Their efforts resulted in the then-influential Geneva Protocol of 1923 and Geneva Convention of 1927.²⁵⁵

Thirty years later, drafters citing weaknesses in these agreements helped draft the Convention.²⁵⁶ Experts at the time recognized that "the 1927 Geneva Convention was a considerable step forward, but it no longer entirely [met] modern economic requirements."²⁵⁷ Drafters had the fairly radical objective of proposing a new international system of enforcement of arbitral awards.²⁵⁸ Not every nation was enthusiastic about the Convention, as evidenced by the behavior of representatives from the United States.²⁵⁹ Yet, the result was an influential convention whose dominance in arbitration has extended for over five decades. Professor van den Berg's proposal today stands at the same crossroads as Sanders' proposal did over fifty years ago.

²⁵⁰ See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 966 (2000).

²⁵¹ See BORN, *supra* note 5, at 8.

²⁵² See *id.* at 23-32.

²⁵³ See *id.* at 50-51.

²⁵⁴ See *id.* at 58.

²⁵⁵ See *id.* at 58-64.

²⁵⁶ See BORN, *supra* note 5, at 92-93.

²⁵⁷ *Id.* at 93 (citing *Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its Meeting of 13 March 1953*, reprinted in, 9(1) ICC Ct. Bull. 32 (1998)).

²⁵⁸ See BORN, *supra* note 5, at 93.

²⁵⁹ The U.S. delegation participated little in the drafting process and did not recommend signing the New York Convention. See Alford, *supra* note 12, at 71-72; Ramona Martinez, Comment, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L L. 487, 491 (1990).

There may be ambivalence by some and resistance by others, but the road to revision is by no means an impassable one.

Finally, leaving the Convention's weaknesses unaddressed will cause many problems to linger. The word "danger" may be too strong, but retaining the status quo will only cause issues with the Convention to fester. The enforcement of annulled awards is a highly visible example. Some favor a more deferential approach to the arbitral jurisdiction, while others perceive a broader ranging role for enforcement courts.²⁶⁰ Courts have taken disparate approaches as well, and the result has been divergent national views regarding the interpretation of key provisions of the Convention as applied to arbitral awards.²⁶¹ This divergence results in reduced international coordination and harmonization, which firms rely on to keep the Convention effective and reliable.

Inaction will also delay resolution of future problems. Inevitably, the environment of commercial arbitration in a decade or two will be different than the one today's businesspeople face. Issues arising during a drafting that is already in progress can be more readily integrated into the new convention. Leaving the Convention unrevised will only allow future issues to further weaken the effectiveness of its provisions.

V. Conclusion

The Convention has had an impressive fifty-year run. Few international agreements have been adopted by so many countries and have delivered so many benefits to international commercial enterprises. That being said, even the most illustrious of legal documents may need updating on occasion. With the "golden years" of the Convention's efficacy arguably behind us,²⁶² the time has come to propose revisions and updates to this important document.

While many provisions are in need of changes, one of the most controversial and pressing problems is the enforcement of

²⁶⁰ Compare GHARAVI, *supra* note 78, at 76 *passim* (arguing against broad enforcement of annulled awards), with Pengelley, *supra* note 117, at 195 (favoring a more active approach for enforcement courts regarding annulled awards).

²⁶¹ See e.g., GHARAVI, *supra* note 78, at 77-96.

²⁶² See van den Berg, *Proposed "New New York Convention"*, *supra* note 184, at 21.

annulled awards. Perhaps it was unthinkable at the time of the Convention's drafting that non-situs courts would engage in so much interference; however, the permissive language of Article V to set aside awards, combined with the mandatory language of Article VII to give parties greater local rights, has created division and conflict across and within national jurisdictions. The controversy has attracted the exploration of many scholars and practitioners developing differences of opinion regarding which judicial practice most effectively furthers the Convention's goals.²⁶³

Professor van den Berg's proposal for a contemporary Convention represents the most thoughtful and realistic proposal to date. The proposed revisions update language where required, clarify where ambiguity exists, and add new language that meets the needs of a modern business environment. These actions are all accomplished while maintaining the basic integrity of the current Convention and sustaining its goal of encouraging the implementation of arbitration and encouraging prompt enforcement. These achievements are particularly compelling regarding the enforcement of annulled awards. While not every nation's representatives will likely hail the revision, the proposal resolves much of the discord in commercial arbitration in favor of respecting decisions of national courts in the arbitral situs within the context of limited set aside provisions.

In spite of its merits, the revision has a long road ahead. No doubt there will be further consultations, commentary, and revisions to the proposed draft. Perhaps sometime in the near future, while on a weekend visit to a relative, Professor van den Berg or another enterprising expert will sit in a leafy suburban garden and craft the final revision to this convention that will be adopted by member states. The means might be a laptop rather than a typewriter, but the result will likely be the same—a useful and widely recognized Convention that efficiently and clearly governs the substance and practice of international commercial arbitration. Until then, rules governing enforcement of annulled awards will remain discordant, confusing, and challenging to the most important parties in arbitration—the enterprises that must follow these rules while settling international commercial disputes.

²⁶³ See *supra* text accompanying notes 11-12.

Appendix

Figure 1: A Comparison of the New York Convention (Article V) and the van den Berg Revision (Article 5)²⁶⁴

New York Convention Article V	Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards Article 5 – Grounds for Refusal of Enforcement
[No comparable provision]	1. Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.
[No comparable provision]	2. Enforcement shall be refused on the grounds set forth in this article in manifest cases only.
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes the competent authority where the recognition and enforcement is sought, proof that:	3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or	(a) there is no valid arbitration agreement under the law of the country where the award was made; or

²⁶⁴ Albert Jan van den Berg, *A Closer Look at the New York Convention*, 3 GLOBAL ARB. REV. 14, 18-19 (2008).

<p>(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or</p>	<p>(b) the party against whom the award is invoked was not treated with equality or was not given a reasonable opportunity of presenting its case; or</p>
<p>(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or</p>	<p>(c) the relief granted in the award is more than, or different from, the relief sought in the arbitration and such relief cannot be severed from the relief sought and granted; or</p>
<p>(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or</p>	<p>(d) the composition of the arbitral tribunal was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country where the award was made; or</p>
<p>[See paragraph 1(d)]</p>	<p>(e) the arbitral procedure was not in accordance with the agreement of the parties, or in the absence of such an agreement, not in accordance with the law of the country</p>

	where the award was made; or
[See paragraph 1(e)]	(g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph; or
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:	[See paragraph 4 below]
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or	[Subsumed in ground (h) below]
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.	(h) enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought.
	4. The court may on its own motion refuse enforcement of an arbitral award on ground (h) of paragraph 3.
[No comparable provision]	5. The party against whom the award is invoked cannot rely on grounds (a) to (e) of paragraph 3 if that party has not raised them in the arbitration without undue delay after the moment when the existence of the ground became known to that party.

Figure 2: A Comparison of the New York Convention (Article VII(1)) and the van den Berg Revision (Article 7)²⁶⁵

New York Convention Article VII(1)	Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards Article 7 – More-Favourable- Right
1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.	If an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis.

²⁶⁵ *Id.* at 20.